

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DONNIE J. FORD and DEPARTMENT OF THE AIR FORCE,
McCLELLAN AIR FORCE BASE, Sacramento, Calif.

*Docket No. 96-2146; Submitted on the Record;
Issued May 3, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for further review on the merits of his claim under 5 U.S.C. § 8128(a).

On January 5, 1992 appellant, then a 41-year-old metal tank sealer, filed a Form CA-2 claim for benefits, alleging he had sustained stress, anxiety, depression, hepatitis and liver problems due to factors of his federal employment. Appellant stated that he first became aware that these conditions were caused or aggravated by his employment on December 19, 1990.

By decision dated June 30, 1992, the Office denied appellant's claim, finding that he failed to submit medical evidence sufficient to establish that the claimed conditions and disabilities were causally related to factors of his federal employment.

In a letter dated July 26, 1992, appellant requested an oral hearing.

By decision dated November 30, 1992, an Office hearing representative vacated the Office's prior decision and remanded the case file to the district office. The hearing representative stated that appellant should be referred to a Board-certified specialist to determine whether he had a liver condition causally related to factors of his federal employment, and if so, to determine the work restrictions imposed due to this condition. The hearing representative ordered the district office to determine on remand whether appellant had been required to return to a toxic worksite following his exposure to injurious chemicals and his physician's subsequent recommendation to remove him from the toxic environment. The hearing representative also ordered the district office to further develop and reconsider the psychiatric claim.

Appellant was referred to Dr. Craig A. Johanson, Board-certified in internal medicine and a specialist in gastroenterology, who examined appellant on March 22, 1993 and submitted an

opinion dated May 7, 1993. He had appellant undergo several diagnostic tests, reviewed the medical history, stated findings on examination and found:

“[T]he diagnosis on appellant continues still to be elusive with a fluctuating course of low-grade elevations of liver enzymes which could be due to a variety of causes, most obvious of which in his case would be toxic exposure to the chemicals used in his duties as a metal tank sealer but also significantly to the fact that this applicant has gained an inordinant [sic] amount of weight documented in the medical record as over 75 to 80 pounds in the course of developing abnormal liver function tests. He also has elevated blood sugars as well as serum cholesterol and triglycerides and I would feel that a more likely diagnosis in this applicant would be that of fatty infiltration of the liver secondary to obesity and prediabetes rather than toxic exposures to chemicals in the workplace.

“My reasons for the last statement are the fact that his fluctuations in liver function tests do not seem to correlate well with being present at or away from his work environment. He now has been present at or away from the work environment for more than one year and continues to have [elevations] of liver function tests. I find no evidence to suggest a chronic liver disease condition in this applicant, specifically his serum globulin, serum albumin and alkaline phosphatase tests remain well within normal limits. A hepatitis related to toxic chemical exposure would certainly have been expected to resolve over a one year period of time absent any further exposure unless the applicant already had cirrhosis or some permanent longstanding damage to the liver which he shows no evidence of either biochemically or on physical examination.”

Dr. Johanson concluded that the best way to definitively diagnose and determine the cause of appellant's condition was a percutaneous liver biopsy, which could be performed at a hospital.

By telephone call dated May 26, 1993, appellant's attorney, acting at appellant's behest, rejected Dr. Johanson's recommendation to have a biopsy performed.

By decision dated May 28, 1993, the Office denied appellant compensation for benefits based on either an employment-related liver condition or emotional condition. The Office found that appellant failed to submit sufficient medical evidence to establish an employment-related liver condition, stating that Dr. Johanson's opinion indicating no specific cause for appellant's liver condition represented the weight of the medical evidence. With regard to appellant's claim for an emotional condition causally related to his federal employment, the Office found that appellant failed to submit sufficient corroborating evidence in support of factors of employment he cited, and that other allegations he made did not implicate compensable factors of employment.

In a letter dated June 19, 1993, appellant's attorney requested an oral hearing, which was held on February 10, 1994. In support of his request, appellant submitted an August 12, 1993 report from Dr. John J. Champlin, a Board-certified family practitioner. Dr. Champlin indicated that appellant had been removed from his working environment secondary to his depression, anxiety and hepatitis, and that he had also been undergoing psychotherapy treatment. He stated that appellant had been undergoing chemotherapy until May 12, 1992, at which time he was

released to return to work in an environment separated from hepatotoxic chemicals. Dr. Champlin stated that appellant had been seen on June 7, 1993 and that his condition remained unchanged, with his liver functions running from one and a half to three times normal, and that he continued to exhibit the mild fattening which would “certainly” preclude him from work around hepatotoxic chemicals. He also stated that his anxiety and depression were well controlled by his medication. Dr. Champlin concluded that appellant had suffered a significant work-related injury which was compounded by the psychological treatment he received from the employing establishment.

A hearing was held on February 10, 1994.

By decision dated December 28, 1994, the Office affirmed its prior decision denying benefits.

By letter dated December 18, 1995, appellant’s attorney requested reconsideration. In support of his request, appellant’s attorney submitted several medical reports, most of which the Office had previously reviewed in prior decisions. The only medical report not previously considered by the Office was a July 2, 1992 report from Dr. Henry J. Donnelly, Board-certified in preventive medicine. Dr. Donnelly found that appellant remained temporarily totally disabled with a preclusion from engaging in his customary job, but stated that he needed to review the complete medical record before he could issue a final opinion regarding the permanency of appellant’s disability. He diagnosed toxic exposure to an array of toxic chemicals which have had a variety of potential toxic effects, including headaches, dizziness and numbness on the right side, in addition to memory lapses; various respiratory effects including coughing, wheezing, chest pains and shortness of breath; and liver damage which may well have resulted as a result of his toxic exposures, although Dr. Donnelly advised that due to the “meager” medical records at hand he did not see any evidence that a particular form of communicable hepatitis had been involved.

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant’s case for further review on the merits of his claim under 5 U.S.C. § 8128(a).

The only decision before the Board on this appeal is the April 22, 1996 Office decision which found that the evidence submitted in support of appellant’s request for reconsideration was insufficient to warrant review of its prior decision. Since the April 22, 1996 decision is the only decision issued within one year of the date that appellant filed his appeal with the Board, June 26, 1996, this is the only decision over which the Board has jurisdiction.¹

Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a point of law; by advancing a point of law or fact not previously considered by the Office; or by submitting relevant and pertinent evidence not previously considered by the Office.² Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the

¹ See 20 C.F.R. § 501.3(d)(2).

² 20 C.F.R. § 10.138(b)(1); *see generally* 5 U.S.C. § 8128(a).

claim.³ Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.⁴

In the present case, appellant's attorney failed to show in his December 18, 1995 letter that the Office erroneously applied or interpreted a point of law or fact not previously considered by the Office; nor did he advance a point of law not previously considered by the Office. Neither has he submitted relevant and pertinent evidence not previously considered by the Office. The issue in this case is medical in nature and must be addressed by a physician. The medical evidence appellant submitted in support of his contention that his claimed conditions or disabilities were causally related to factors of his federal employment was the July 2, 1992 report of Dr. Donnelly, who found appellant temporarily totally disabled at that time but whose opinion regarding the causal relationship of appellant's respiratory symptoms and liver damage to his toxic exposure at work was generalized and equivocal, and, by his own admission, not based on a complete medical history. Therefore, the Office properly refused to reopen appellant's claim for a review on the merits.

The decision of the Office of Workers' Compensation Programs dated April 22, 1996 is affirmed.

Dated, Washington, D.C.
May 3, 1999

George E. Rivers
Member

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

³ 20 C.F.R. § 10.138(b)(2).

⁴ See *Eugene F. Butler*, 36 ECAB 393, 398 (1984).